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Regulating Restrictive Covenants in English Employment Law: Time for a Rethink?

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Abstract

The potentially chilling effects of non-compete covenants on the ambitions and capacities of former employees to forge careers as commercial entrepreneurs have been propelled to the forefront of public debate in recent years. For example, in the US, reports in the press of rank and file employees working in sandwich bars being restrained by post-employment restrictions have sparked outrage. Nor has public debate in the UK been immune to such concerns. For example, the British Government has issued a call for evidence and a separate consultation paper on the future of non-compete covenants. The emphasis in these papers has been on versing the possible adverse consequences of non-compete covenants for the public good, the wider economy and social policy. Taking these ideas in the Government's work as its point of departure, the concepts of the public interest and economic power are evoked in this article. Ultimately, the claim is made that in deciding whether to enforce non-compete covenants, the courts should afford greater significance to the public interest in the current incarnation of the common law restraint of trade doctrine. And this calls for a much livelier sense of the economic power that such covenants enable employers to exploit in the labour market, as well as the resultant social costs imposed on the public, consumers and society.

Keywords

Law, Economics, Restrictive Covenants, Labour Law, Employment Law, Doctrine in Restraint of Trade, Law Governing the Contract of Employment, Economic Power of Employers.

Regulating Restrictive Covenants in English Employment Law: Time for a Rethink?

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1. Introduction

Although employment relationships are characterised by both inequality of bargaining power and employee subordination to the employer, the common law has clung to the fiction that the parties are formally equal and that it should play a neutral role.¹ The received wisdom is that protective legislation and collective bargaining are necessary institutions, designed to offset or dilute these two key features characteristic of the employment relationship. But the eminent British labour lawyer Kahn-Freund² understood very well that there were limits to the common law's adherence to formal neutrality in the case of the contract of employment. He realised that there was one significant isolated situation where the courts would harness the common law to 'lift the veil of [formal] equality and to allow the fact of subordination to impinge upon the validity of [the contract of employment]'.³ And that instance was in the case of the doctrine of

* I would like to thank Alberto Brown, Karen McGill and the anonymous reviewers for their helpful comments on the drafts of this paper.

¹ KAHN-FREUND'S LABOUR AND THE LAW 14-18 (Paul Davies & Mark Freedland eds., 1983). For the reasons that the courts generally cleave to the notion that the parties are formally free and equal in contracting, see Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 580-587 (2009).

² Otto Kahn-Freund was a German émigré from Nazi Germany: see MARK FREEDLAND, *Otto Kahn-Freund (1900-1979)*, in JURISTS UPROOTED 299 (Jack Beatson & Reinhard Zimmermann eds., 2004) and Ruth Dukes, *Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?* 72, No.2 MOD. L. REV. 220 (2009).

³ KAHN-FREUND'S LABOUR AND THE LAW, *supra* note 1, at 35-36. See also Frank Carrigan & Peter Radan, *The Post-Employment Restraint of Trade Doctrine: A Critical History*, 31 K.L.J. 121, 122 (2020). As

restraint of trade, where the common law would be deployed as a means of protecting the employee from onerous restrictive covenants – which are essentially express contractual terms in the employee’s employment contract prohibiting them from working for a competing business of the employer after the termination of the employment contract. More tellingly, however, the policy for doing so is not the inequality of bargaining power existing in the employment relationship, but instead, the freedom of the employee to trade and the interest of the public in ‘preventing employees from depriving themselves of their freedom to compete’.⁴ Seen from this perspective, somewhat surprisingly, non-compete restrictive covenants are regulated by the restraint of trade doctrine despite – rather than because of – the inequality of bargaining power⁵ lying at the heart of the employment relationship.⁶ And the foundation for that common law intervention was and is the protection of liberty, competition and trade.

such, this was a recognition that formal equality should yield to a more substantive form of equality: for the distinction between formal equality and substantive equality see Avihay Dorfman, *Private Law Exceptionalism: Part II: A Basic Difficulty with the Argument from Formal Equality*, 31 CAN. J.L. JURIS. 5 (2018).

⁴ KAHN-FREUND’S LABOUR AND THE LAW, *supra* note 1, at 35-36.

⁵ This is consistent with general principles of English contract law, which has always rejected the notion that the existence of inequality of bargaining power in a contractual relationship is a sufficient justification to interfere with the terms of the contracting parties’ bargain: *National Westminster Bank plc v Morgan* [1985] AC 686 (UKHL) 708A-D (Lord Scarman) (appeal taken from EWCA (Civ)) and *Uber BV v Aslam* [2021] UKSC 5 [68] (Lord Leggatt) (appeal taken from EWCA (Civ)).

⁶ Contrast this with the view of Lord Diplock who asserted that the basis for the restraint of trade doctrine was ‘abuse of bargaining power’ and ‘... not some 19th-century economic theory about the benefit to the general public of freedom of trade...’: *Schroeder Music Publishing Co. v Macauley* [1974] 1 WLR 1308 (UKHL) 1315F (appeal taken from EWCA (Civ)). It is also arguable that Lord Macclesfield’s judgment in *Mitchel v Reynolds* (1711) 1 P Wms 181 (Eng.) was partly motivated by a concern to temper inequality of bargaining power: see Harlan M Blake, *Employee Agreements Not to Compete*, 73, No.4 HARV. L. REV 625, 637 (1960). For discussion of this point, see GORDON ANDERSON ET AL., THE COMMON LAW EMPLOYMENT

Developing this point further, the legal doctrine of restraint of trade can be thought of as a sorting mechanism for the common law to intercede in disputes where a number of liberties clash. And there are private and public dimensions to that mediating role. From the private angle, on one side of the equation lies freedom of contract and on the other sits the employee's freedoms to quit (a contract), of labour mobility and to ply his/her trade. Having entered into an employment contract including a non-compete clause openly and freely, it is arguable that the employee's and employer's private interests in freedom of contract should be respected by holding the former as legally bound by that promise. On the other hand, there is the private interest in the employee's liberty to quit his or her employment and to move and exercise his/her freedom to contract to take up employment with a(ny) new employer to carry on his/her trade or occupation, without the imposition of any onerous curbs. Apart from adjudicating between these private freedoms, the doctrine also performs another function in reaching a resolution where private *and public* interests conflict. It does so by striking a balance between the private legitimate interests of the employer in protecting its property rights, goodwill and trade connections on the one hand and the public interest in the promotion and facilitation of free competition, entrepreneurship and innovation on the other hand, which are essential for the operation of a competitive market economy.⁷ The doctrine mediates between these competing interests by deploying a "reasonableness" standard. This test is long-standing,⁸ but

RELATIONSHIP 177-178 (2017) and for an analysis as to how English common law tends to eschew over-generalised concepts such as 'inequality of bargaining power' as a pretext for private law interventions, see Marcus Moore, *Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability*, 134 L.Q. REV. 257 (2018).

⁷ MICHAEL J TREBILCOCK, THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS 411-414 (Carswell 1986). However, the common law has consistently overlooked this public dimension, on which, see the discussion in part 4 below.

⁸ *Mitchel v Reynolds* (1711) 1 P Wms 181 (Eng.).

not quite as old as the doctrine itself,⁹ and prescribes that the restriction imposed by the employer on the employee should be no more than is reasonably necessary for the employer to protect its legitimate interests: more later on the detail in sections 2 and 3 below.

The main objective of this paper is to probe the basic common law rules on restraint of trade and to offer a critique. First, section two turns to briefly examine the theoretical imperative of upholding an employee's negative liberty and how the doctrine attempts to do so by negotiating a secure path between the employee's freedom to trade and the harms and injuries that its exercise may cause to others. In section three, the discussion moves on to forensically examine the legal concepts that are deployed to reconcile this tension and how they each perform that role. Section four considers the primary argument that animates the discussion in this article. And that is the claim that the broader interests of those potentially injured by the prioritisation of an employee's freedom to compete and trade – for example, the wider society and the public – should be afforded even greater purchase than the restraint of trade doctrine hitherto has afforded them. The justifications for such an argument are also presented in this part, as well as the prescription, which comprises a package of reforms. The broader significance and originality of the latter lies in the extent to which it channels the public interest strand of the 'reasonableness' test addressing the enforceability of restrictive covenants as a means of enjoining the courts to take into account the economic power of employers. Section 5 then draws certain conclusions, namely that the omission of any analysis of labour market power in the application of the common law restraint of trade doctrine is no longer tenable in light of recent research findings on the prevalence/ubiquity of employer monopsony

⁹ See *Dyer's Case* (1414) 2 Hen. 5, f 5, pl 26 (Eng.). For an historical account and critique of the development of the common law restraint of trade doctrine, see Blake, *supra* note 6, at 629-646 and Carrigan & Radan, *supra* note 3, at 125-135.

and the contribution of non-compete covenants in facilitating and entrenching uncompetitive labour markets.

2. Where the Tension Has Traditionally Lain: Negative Liberty, Competing Freedoms, and Justified Interference

The foundation for the restraint of trade doctrine developed by the common law is the classical liberal tradition. And more importantly, the philosophical concept of negative liberty, whose principal exponents were Berlin,¹⁰ Kant,¹¹ Mill,¹² Bentham,¹³ and Hobbes.¹⁴ As such, it is entirely rooted in principle rather than policy, having an entirely individualistic basis that is steeped in modern liberalism.¹⁵ In the words of Berlin:

“I am normally said to be free to the degree to which no man or body of men interferes with my activity... If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved...”¹⁶

¹⁰ ISAIAH BERLIN, *Two Concepts of Liberty*, in ISAIAH BERLIN, *LIBERTY, INCORPORATING FOUR ESSAYS ON LIBERTY* 166-181 (Henry Hardy ed., 2002).

¹¹ IMMANUEL KANT, *A CRITIQUE OF PURE REASON* (Paul Guyer & Allen Wood eds. & trans. 1998).

¹² JOHN STUART MILL, *Of the Grounds and Limits of the Laisser-Faire or Non-Interference Principle*, in *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 334 (1994).

¹³ *THE WORKS OF JEREMY BENTHAM* (John Bowring ed., William Tait 1838-1843).

¹⁴ THOMAS HOBBES, *LEVIATHAN* 146 (Richard Tuck ed., 1991).

¹⁵ For the distinction between policy and principle in private law, see Ross Grantham & Darryn Jensen, *The Proper Role of Policy in Private Law Adjudication*, 68 U. TORONTO L.J. (2018).

¹⁶ BERLIN, *supra* note 10, at 169-170.

This passage yields the proposition that in order to facilitate an individual employee's freedom, the state should refrain from sanctioning laws interfering in that individual's sphere of action. That is what is meant by 'negative liberty'. However, Berlin goes on to identify the limits to this principle. That is, those circumstances where non-interference will deprive the liberty of others or result in their harm:

[However, it is] supposed that [my freedom] could not, as things were, be unlimited, because if it were, it would entail a state in which all men could boundlessly interfere with all other men; and this kind of 'natural' freedom would lead to social chaos ... Consequently... the area of men's free action must be limited by law... Upon what principle should this be done?... [compulsion can be justified and]... since justice demands that all individuals be entitled to a minimum of freedom, all other individuals [a]re of necessity to be restrained, if need be by force, from depriving anyone of it. Indeed the whole function of law [i]s the prevention of just such collisions.¹⁷

This value of negative liberty is inherent in the common law's approach to the employee's freedom to trade. In particular, the common law developed the restraint of trade doctrine as a means of navigating between this freedom and non-compete covenants ("freely" entered into by the employee in the employment contract). In the words of Lord MacNaghten in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co*:

"The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule."¹⁸

¹⁷ Id. at 169-174. Writer's annotations appear in square brackets throughout this article.

¹⁸ *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1984] AC 535 (UKHL) 565 (appeal taken from EWCA (Civ)).

This passage illustrates how the common law prescribed that the employee's freedom to ply his/her trade should generally take precedence over other freedoms such as freedom of contract, or policy considerations.¹⁹ And from the perspective of incentivising competition, the doctrine 'was perhaps the common law's [greatest] contribution... for it [became] in consequence very difficult to prevent business and technical information from leaking to rivals'.²⁰

However, consistent with Berlin's concerns to constrain negative liberty in the interests of ensuring that there is no imposition of harm on others or deprivation of the liberty of others, the common law rule was modified to impose limits. As such, any suggestion that the restraint of trade doctrine affords unremitting precedential priority to the employee's freedom to ply his/her trade must provoke very strong resistance. In *Tillman v Egon Zehnder Ltd.*,²¹ Lord Wilson provided the following explanatory account of this common law development:

"the absolute nature of the right of the ex-employee... irrespective of his covenant began to be tempered. For paradoxically the doctrine against restraint of trade *was positively inhibiting trade*. In *Nordenfelt*... Lord MacNaghten explained:

"it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence... [e.g.] every [former employee] was a possible rival. So the rule was relaxed.""²²

¹⁹ Indeed, at one point in time, non-interference with the employee's freedom was absolute and represented the extent of the doctrine: see the case law discussed in section 3 below that was decided prior to *Mitchel v Reynolds* (1711) 1 P Wms 181 (Eng.).

²⁰ WILLIAM CORNISH ET AL., *LAW AND SOCIETY IN ENGLAND 1750-1950* 339 (Hart Publishing 2019).

²¹ *Tillman v Egon Zehnder Ltd.* [2019] UKSC 32, [2020] AC 154, 164G-165B (appeal taken from EWCA (Civ)).

²² *Id.* Author's emphasis shown in italics in text.

In this way, the sentiments of the common law went through a process of adjustment, resulting in a recognition that there were limits to the prioritisation of the employee's negative liberty. This was deemed justifiable on a mixture of grounds, some of which were reflective of the need to sustain other positive liberties – such as freedom of contract,²³ the freedom to contract, and the freedom to quit (a contract), as well as various principles regarding the prevention of harm to, or unjustified intrusion in the freedom of, others, and the promotion of employee loyalty to the employer – and others more policy-oriented in nature, such as the protection of (the employer's) property and other legitimate commercial interests, the prevention of opportunistic employee behaviour,²⁴ the incentivisation of positive managerial behaviour,²⁵ as well as the interests of the economy and public in incentivising increased productivity, innovation, business competition and enhanced economic efficiency.²⁶ Positive liberties are as equally fundamental as negative liberties and should be upheld and protected by the law insofar as they

²³ However, interestingly, when the current incarnation of the restraint of trade doctrine (to include the 'legitimate interest' and 'reasonableness' strands of the test) was fashioned by Lord Macclesfield in 1711 in *Mitchel v Reynolds*, there is a strong claim that his Lordship was not particularly concerned about upholding freedom of contract: see Blake, *supra* note 6, at 637. Instead, this came much later in the Victorian period, e.g. see the judgment of Jessel MR in *Printing & Numerical Registering Co. v Sampson* (1875) LR 19 Eq 462, (Ch) at 465 (Eng.).

²⁴ In the absence of such provisions, 'workers would have an incentive to behave opportunistically—to try to violate such contracts and capture for themselves the value of the [confidential information and trade secrets of the employer]': Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 98 (1981).

²⁵ Without such clauses, employers are more likely to be reluctant to invest in training for, and the specific human capital of, their employees, thus resulting in inefficient levels of investment at a macro level in the economy: see Id. 93 & 95-96.

²⁶ See Blake, *supra* note 6, at 650.

enable persons to fulfil their own choices and exercise their autonomy.²⁷ Seen in this light, the doctrine of restraint of trade is the means by which the negative liberty of the employee to trade is weighed against the same employee's expression of positive liberty in the guise of the exercise of their freedom of contract under the non-compete covenant. Lord MacNaghten is instructive in describing how the restraint of trade doctrine was adapted to strike this balance:

“It is a sufficient justification, and indeed it is the only justification [for interfering in an employee's liberty after the termination of the contract of employment], if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.”²⁸

In this passage, Lord MacNaghten makes the point that the lawfulness of the restraint is measured in light of legal concepts such as ‘legitimate interest’ and ‘reasonableness’, as well as legal techniques such as the ‘proportionality’ yardstick. It is by these three legal measures that the law decides whether the employee's negative liberty to trade should yield to their positive liberty of contract, or vice versa. And if we unpack in turn each of the received notions of ‘legitimate interest’, ‘reasonableness’ and ‘proportionality’, the former demands that the employer identify a legitimate commercial or other interest in relying on the non-compete restriction. As noted by Lord Wilberforce in *Stenhouse Ltd. v Phillips*,²⁹ the legitimate interest must be something that can be likened to a proprietary right. For example, the courts have recognised the trade secrets or customer base and connections of the employer as sufficiently

²⁷ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 409-410 (Clarendon, 1986).

²⁸ *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1984] AC 535 (UKHL) 565 (appeal taken from EWCA (Civ)).

²⁹ [1974] AC 391 (PC) 400E-G (appeal taken from NSW, Austl.).

worthy of material protection in this regard.³⁰ This is reflective of the long-term investment made by the employer in amassing such resources necessary for running the business, rather than the employee's 'innate skills, or more generally, skills which [he/she] brings to the job...'³¹ which belong and pertain solely to the employee. For that reason, a proprietary interest of the employer must be identified, which is distinguishable from the employee's own skills, experience, know-how and general knowledge.³² In this way, a general exclusion of competition will never be upheld in favour of the employer.³³ This takes us onto the second requirement that the non-compete covenant must be reasonable, which means that it must go no further than is reasonably necessary to achieve or satisfy that legitimate interest. And in order to make this evaluation, the courts adopt the proportionality measure of review. This involves enquiring whether the employer's need for that specific covenant to protect the invoked legitimate interest is so pressing that it outweighs the harm to the employee of being deprived of his/her liberty to trade and/or any harm to the wider interests of the public, e.g. in

³⁰ *Herbert Morris Ltd. Saxelby* [1916] 1 AC 688 (UKHL) at 701-2 (Lord Atkinson) and *One Step (Support) Ltd. V Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1, 11D-F [32] (Christopher Clarke LJ). There are exceptions applicable in the case of commercial connections: *Mason v Provident Clothing & Supply Co.* [1913] AC 724 (UKHL) 743 (Lord Moulton) (appeal taken from EWCA (Civ)). The non-compete clause itself may specify a particular legitimate interest and if none is identified, the courts will look at the surrounding circumstances to attempt to find one: *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214 (EWCA) 219 (Sir Christopher Slade) (appeal taken from QBD).

³¹ Stephen A. Smith, *Reconstructing Restraint of Trade*, 15 OXF. J. LEG. STUD. 565, 577 (1995). See also TREBILCOCK, *supra* note 7, at 119-142.

³² For example, see *FSS Travel and Leisure Systems v Johnson* [1998] IRLR 382 (EWCA (Civ)) 385 [29]-[34] (Lord Justice Mummery).

³³ *Scottish Farmers Dairy Co (Glasgow) v McGhee* (1933) SC 148, 152-153 (Lord President Clyde) (Scot.).

facilitating competition, encouraging innovation, etc.³⁴ And a variety of factors are deployed in support of this balancing act, which we now come to address in section 3.

3. The Current Law

Introduction

The common law courts have adopted a series of factors that may be understood as variables that function as finely tuned proxies for the ‘legitimate interest’, and ‘reasonableness’ criteria, as well as the process of balancing them off against each other pursuant to the ‘proportionality’ exercise. Another way of expressing the same point is that these variables enable the courts to evaluate whether the terms of the covenant fall within or go beyond what is reasonably necessary for the employer to achieve its legitimate interests of protecting its customer base and trade secrets. To that extent, they are not external to the common law test, but can be thought of as inherent within, and lying just under the surface of, the principal criteria. In applying each of these variables, the reasonableness of the non-compete clause must be ascertained by reference to reasonable persons in the position of the employer and the employee at the point in time when the contract of employment was entered into, rather than taking into account the future or subsequent developments.³⁵ Another basic rule is that the onus falls on

³⁴ MARK FREEDLAND, *THE PERSONAL EMPLOYMENT CONTRACT* 182, (2003). However, the second public-oriented element of this test is commonly ignored by the courts and conflated with the private bipolar interest into one step: see section 4 below.

³⁵ See *Gledhow Autoparts v Delaney* [1965] 1 WLR 1366 (EWCA (Civ)), 1377D (Diplock LJ), *Coppage v Safety Net Security Ltd* [2013] EWCA Civ 1176 [2013] IRLR 970, 972 [9] (Sir Bernard Rix) (appeal taken from QBD) and *QBE Management Services (UK) Ltd. v Dymoke* [2012] EWHC 116 (QB), [2012] IRLR 458,

the employer to establish the reasonableness of the non-compete restriction.³⁶ Likewise, that in testing the validity of the non-compete restraint, hypothetical factors are not to be factored into the equation, particularly if they are speculative or extremely unlikely to have entered into the reasonable contemplation of the parties.

The Relevant Variables

Of central significance in carrying out the balancing part of the proportionality exercise are factors such as the extent of the territorial restriction and the duration of the period of the non-compete restraint.³⁷ The degree of clarity surrounding the criteria to be applied in relation to these two factors could not be more far removed from each other. By way of illustration, a 12-month prohibition will generally be treated as unreasonably long and as such, an illegitimate restraint on general competition with the employer.³⁸ Meanwhile, if the restrictive period is six

480 [210] (Haddon-Cave J). For that reason, if the employer ceases to have a relevant legitimate interest (such as a trade secret or customer base and connection) after the non-compete covenant is entered into, it will remain enforceable: *Towry EJ v Bennett* [2012] EWHC 224 (QB).

³⁶ *QBE Management Services (UK) Ltd. v Dymoke* [2012] EWHC 116 (QB), [2012] IRLR 458, 480 [210] (Haddon-Cave J). However, if the employer is successful in discharging this burden, as regards the employer's preferred remedy of injunction, the onus shifts to the employee to persuade the court why it should be refused.

³⁷ See *ANDERSON ET AL.*, *supra* note 6, at 183-184. Of course, the effect of both is looked at cumulatively, e.g. if the territorial restriction is very limited, then greater latitude will be given in respect of the temporal restriction and vice versa: see *Fitch v Dewes* [1921] 2 AC 158 (UKHL) 163 (Lord Chancellor Birkenhead) (appeal taken from EWCA (Civ)).

³⁸ See *Energy Renewals Ltd v Borg* [2014] EWHC 2166 (Ch), [2014] IRLR 713 and *Prophet plc v Huggett* [2014] EWCA Civ 1013, [2014] IRLR 797. However, for some exceptions, see *A&D Bedrooms Ltd. v Michael* 1984 SLT 297 (Scot.), *Scottish Farmer's Dairy (Glasgow) Ltd. v McGhee* 1933 SC 148 (Scot.), *Freshasia Foods Ltd. v Lu* [2019] EWHC 638 (Ch), *Thomas v Farr plc* [2007] EWCA Civ 118, [2007] ICR 932, *Merlin*

months and this is broadly comparable to the employee's period of notice of termination of employment, it is very common for this to be considered a reasonable period.³⁹ The general approach as regards temporal restrictions can be contrasted with the common law's attitude towards the extent of the geographical area, which is characterised by a large degree of ambiguity. In one famous case, although the footprint of the restriction extended to the entire world, it was nonetheless ruled to be reasonable,⁴⁰ whereas in another case a 1.2 mile radius of the City of London was held to be too broad in scope and unenforceable.⁴¹ This underscores the point that there is little to be gained by invoking precedents on territorial restrictions as part of any litigation strategy in a particular dispute, since the circumstances of each case will differ where the question of the validity of a covenant is in play.⁴² This feeds into the insight made

Financial Consultations Ltd v Cooper [2014] EWHC 1196 (QB), [2014] IRLR 610 and *D v P* [2016] EWCA Civ 87, [2016] IRLR 355.

³⁹ *Threlfall v ECD Insight Ltd* [2012] EWHC 3543 (QB), [2013] IRLR 185. However, this was not the outcome in *Bartholomews Agri Foods Ltd v Thornton* [2016] EWHC 648 (QB), [2016] IRLR 432, *Ashcourt Rowan Financial Planning Ltd v Hall* [2013] EWHC 1185 (QB), [2013] IRLR 637, *CEF Holdings Ltd v Munday* [2012] EWHC 1524 (QB), [2012] IRLR 912 or *Phoenix Partners Group LLP v Asoyag* [2010] EWHC 846 (QB), [2010] IRLR 594.

⁴⁰ *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1984] AC 535 (UKHL) 554-555 (Lord Watson) (appeal taken from EWCA (Civ)). For the same outcome, see *Bluebell Apparel Ltd. v Dickinson* 1978 SC 16 (Scot.). Contrast this decision with *Hinton & Higgs (UK) Ltd. v Murphy* 1988 SC 353 (Scot.).

⁴¹ *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214 (EWCA) (appeal taken from QBD). But what seems certain is that there must be an area restriction, otherwise the covenant will be invalid: *Ashcourt Rowan Financial Planning Ltd v Hall* [2013] EWHC 1185 (QB), [2013] IRLR 637. See also *Merlin Financial Consultations Ltd v Cooper* [2014] EWHC 1196 (QB), [2014] IRLR 610 and *Freshasia Foods Ltd. v Lu* [2019] EWHC 638 (Ch).

⁴² *Coppage v Safety Net Security Ltd* [2013] EWCA Civ 1176 [2013] IRLR 970, 972 [9] (Sir Bernard Rix) (appeal taken from QBD).

by Ryan about this area of law, which is the extent to which it is characterised by “intense fact-specificity”.⁴³

There is an undercurrent in the case law to the effect that the higher the position of the employee (who has been restrained) in the employer’s organisation, then the more likely the covenant will be reasonable. In this way, it may be claimed that the likelihood of a finding of reasonableness increases proportionally to the seniority of the employee. This can be justified on the basis that such a class of worker will have greater access to the fruits of the employer’s prior investments in certain clients and secret processes.⁴⁴ For this reason, reports of post-employment non-compete restrictions being successfully upheld in the US courts where the employees restrained are low-paid workers employed in a storage warehouse or the fast-food industry are unlikely to be emulated in the English courts.⁴⁵ What is also of relevance is whether colleagues of employees at the same level of expertise are subject to similarly crafted restraints.

⁴³ Desmond Ryan, *Restating Restraint of Trade: The Implications of the Supreme Court’s Judgment in Tillman v Egon Zehnder Ltd*, 49 ILJ 595, 596 (2020). See also DOUGLAS BRODIE, *THE CONTRACT OF EMPLOYMENT* 142 (2008).

⁴⁴ See *Associated Foreign Exchange Ltd v International Foreign Exchange (UK) Ltd* [2010] EWHC 1178 (Ch), [2010] IRLR 964; *CEF Holdings Ltd v Munday* [2012] EWHC 1524 (QB), [2012] IRLR 912.

⁴⁵ See James J Prescott et al., *Understanding Non-Competition Agreements: The 2014 Non-Compete Survey Project*, 2016 MICH. ST. L. REV. 369, 372-374 (2016); Norman D Bishara & Evan Starr, *The Incomplete Non-Compete Picture*, 20 LEWIS & CLARK L. REV. 497, 499 & 508 (2016); Clare O’Connor, *Does Jimmy John’s Non-Compete Clause For Sandwich Makers Have Legal Legs?*, FORBES.COM (Oct. 15 2014) <https://www.forbes.com/sites/clareoconnor/2014/10/15/does-jimmy-johns-non-compete-clause-for-sandwich-makers-have-legal-legs/?sh=73803ac24107> and THE WHITE HOUSE, *NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES* (May. 2016) https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.

However, of far greater importance are two factors in particular. First, there is the definition of the employer's business or market (within which the employer is operating) in the non-compete covenant.⁴⁶ If the business to be protected from competition is too broad in scope, extending beyond that market, the covenant is likely to be struck down. For example, consider an employer whose commercial operation consists of the provision of IT software billing systems for use by professional service firms, such as auditors, attorneys, accountants or actuaries. If the covenant provides that the employee is prohibited from engaging in post-employment competition in respect of IT software systems in general, then the market will be treated as having been drawn far too widely, since the employer's business falls within a very small subset of such a category. In such a case, the clause will be ruled to be in restraint of trade for the reason that it extends beyond what is reasonably necessary to protect the employer's legitimate interests.⁴⁷ Another illustration of the same point is where a non-compete clause directs that the competing market is restricted to that with which the employer was engaged within a defined period of time prior to (e.g. 12 months) the termination of the employee's contract of employment. In such a case, since the market has been limited, the more likely it will be that the contractual provision will be ruled to be reasonable.⁴⁸

⁴⁶ For discussion, see DYSON HEYDON, *THE RESTRAINT OF TRADE DOCTRINE* 158-163 (2018).

⁴⁷ *Scully UK Ltd v Lee* [1998] IRLR 259 (EWCA (Civ)). An especially fraught issue arises where an employee competes by carrying out a commercial line of business after leaving the employer's employment. If the employer dropped that line of business and the employee was responsible for its initial development whilst he was employed for the employer, there is precedent to suggest that the employee will not have infringed the covenant: see *Wincanton v Cranny* [2000] IRLR 716 (EWCA(Civ)), *Threlfall v ECD Insight Ltd* [2012] EWHC 3543 (QB), [2013] IRLR 185 and *Phoenix Partners Group LLP v Asoyag* [2010] EWHC 846 (QB), [2010] IRLR 594.

⁴⁸ See HEYDON., *supra* note 46, at 164-173.

Turning to the second consequential variable, this forms part of the same conceptual tapestry as the restricted market of the employer and focuses on the competitive activities in respect of which the employee is restrained. The significance of this factor has risen in direct proportion to the increase in the specialisation of occupations and jobs and the division of labour in the economy.⁴⁹ Like the restricted market, the activities that the employee is prohibited from engaging in post-termination must also be carefully circumscribed.⁵⁰ For example, if the employee is prevented from selling certain products involved in the employer's scope of business, these should be competitive with those of the employer, or sufficiently comparable at the very least.⁵¹ Meanwhile, if the employee is restrained from being 'indirectly interested in' any business competing with the employer, this will extend to an embargo on the employee holding a small or large shareholding in a competing corporation.⁵²

Remedies

As noted by Mr Justice Fredman in the case of *Argus Media Ltd. v Halim*, an injunction is the main remedy where the courts rule that a non-compete covenant has been breached.⁵³ To that extent, this turns the general rule about the attitude of the English courts towards the availability of injunctions (in enforcing the terms of a contract of employment) on its head.⁵⁴ Indeed, some

⁴⁹ Blake, *supra* note 6, at 675.

⁵⁰ CEF Holdings Ltd v Munday [2012] EWHC 1524 (QB), [2012] IRLR 912.

⁵¹ Argus Media Ltd. v Halim [2019] EWHC 42 (QB), [2019] IRLR 442, 456 (Mr Justice Freedman).

⁵² Tillman v Egon Zehnder Ltd. [2019] UKSC 32, [2020] AC 154, 172B-D (Lord Wilson) (appeal taken from EWCA (Civ)).

⁵³ [2019] EWHC 42 (QB), [2019] IRLR 442, 473 [215] (Mr Justice Freedman). For discussion of this point, see HEYDON., *supra* note 46, at 119-123.

⁵⁴ Which was one of hostility: see *De Francesco v Barnum* (1890) 45 Ch D 430, 438 (Fry LJ) (Eng.); *Ridge v Baldwin* [1964] AC 40 (UKHL), 65 (Lord Reid) (appeal taken from EWCA (Civ)); and *Wilson v St Helen's*

commentators have lamented this phenomenon, describing it as ‘arguably a perverse development in the law... that... has evolved over time to create a monstrous distortion in contemporary... employment law’.⁵⁵

An injunction involves the court making an order restraining the liberty of the employee in accordance with the terms of the non-compete covenant. As such, there is no obligation on the employer to demonstrate any proof of loss arising from the employee’s breach of the covenant.⁵⁶ However, it should be underscored that an injunction is a remedy that is at the discretion of the court, albeit that the onus is on the employee to convince the court that the injunction should be refused.⁵⁷ Seen from this perspective, whether a court should grant an injunction is an equitable matter, meaning that employers must come before the court with clean hands. As such, where the employer has constructively, wrongfully or unfairly dismissed the employee, the balance of equities in the case may point against the award of an injunction.⁵⁸ A second matter to stress arises from the case of *Dyson v Pellerey*, where the court recognised that there will be cases where it would be so prejudicial to an employee and cause him such hardship that it would be unconscionable for the employer to be given injunctive relief. This will be particularly relevant if no damage to the claimant would be caused if there were no enforcement.⁵⁹ In such cases, the employer will be awarded nominal damages. On the other

Borough Council [1999] 2 AC 52 (UKHL), 84A–B (Lord Slynn of Hadley) (appeal taken from EWCA (Civ)).

⁵⁵ For discussion of this point, see ANDERSON ET AL., *supra* note 6, at 185.

⁵⁶ *Insurance Co. v Lloyd’s Syndicate* [1995] 1 Lloyd’s Rep 272 (QBD), 277 (Colman J) and *Dyson v Pellerey* [2016] EWCA Civ 87, [2016] ICR 688, 692–693 (Sir Colin Rimer). The more difficult it is to quantify the damages, the more persuasive the case for an injunction: *Plowman & Son Ltd. v Ash* [1964] 1 WLR 568 (EWCA (Civ)) and *Rentokil v Kramer* (1986) SLT 114 (Scot.).

⁵⁷ *Insurance Co. v Lloyd’s Syndicate* [1995] 1 Lloyd’s Rep 272 (QBD), 277 (Colman J).

⁵⁸ *Cantor Fitzgerald International v Bird* [2002] IRLR 867 (QBD), 885 [140]–[145] (Mr Justice McCombe).

⁵⁹ *Dyson v Pellerey* [2016] EWCA Civ 87, [2016] ICR 688, 692–693 (Sir Colin Rimer).

hand, where the employee subject to the restraint is very highly paid, the more likely the courts will grant an injunction to enforce the non-compete covenant.⁶⁰ A final pertinent issue is whether the employer will derive any practical utility from enforcement.⁶¹

Mandatory or derogable law?

The doctrine of restraint of trade plays a regulatory function by operating as a *mandatory norm*. The mandatory nature of the doctrine means that it is not possible to contract out of it.⁶² This will cover overt, as well as less bald, attempts at the disapplication of the operation of the doctrine.⁶³ For example, it is not unusual for a contract of employment to include a provision in a non-compete covenant that if the court rules that its terms are unenforceable, the parties explicitly confer on the court the power to rewrite the contract to the minimum extent that is necessary to render it enforceable. However, the courts have refused to uphold such a contractual provision. This is on two grounds. First, for the reason that it would only encourage litigation and secondly, and more importantly, that it would involve the courts in an illegitimate reframing of the terms of the parties' private contract, thus enabling them to escape the clutches of the doctrine, which is something that they will not do.⁶⁴

The rationale for this uncompromising stance is its public-protective purpose. It is designed to protect the employee and wider society from 'externalities', i.e. social and

⁶⁰ *Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB), [2010] IRLR 648, 693 [222] (Jack J).

⁶¹ *Jack Allen (Sales & Services) v Smith* [1999] IRLR 19 (Scot.).

⁶² *Hinton & Higgs (UK) Ltd. v Murphy* 1988 SC 353 (Scot.) and *BRODIE*, *supra* note 43, at 133. See Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy and Design*, 99 TEX. L. REV. 283 (2020).

⁶³ For a less overt example, see *Sadler v Imperial Life Assurance Co. of Canada Ltd.* [1988] IRLR 388 (QBD) (Eng.).

⁶⁴ *Townends Group Ltd. v Cobb* [2004] EWHC 3432 (Ch)[60]-[61] (Mr Briggs QC) (Eng). See also *Seabrokers Ltd. v Riddell* [2007] CSOH 146 (Scot.).

economic harms to the employee and others in society.⁶⁵ This finds its expression in the extent to which it polices and constrains the exercise of powers conferred by express contractual terms. The main effect of the court finding that a non-compete restriction is unreasonable is that it will be rendered void, meaning that the courts will not entertain its enforceability by holding that it never existed in the first place.

Severance?

Despite the entrenched status of the doctrine and the inability to contract out of it by agreement, somewhat counterintuitively, it is possible for the courts to sever words from a non-compete covenant under carefully prescribed controls in order to draw it in a way that renders it enforceable. For example, if a portion of the non-compete covenant that is causing it to exceed the reasonableness test can be excised whilst leaving the remainder of the covenant intact, the highest court in the land in the UK has recently indicated its willingness to preserve the validity of the restriction.⁶⁶ The courts will do so by wielding their metaphorical “blue pencil” to remove the impugned wording. In *Tillman*, Lord Wilson’s judgment speaks to the three criteria that must be satisfied before the English courts will entertain severance: first, the unenforceable portion of the non-compete clause must be capable of being removed without the necessity of

⁶⁵ For discussion, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 88-89 (1990). In the context of the employment relationship, see also Cass Sunstein, *Rights Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1054 & 1057 (1984); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 240ff (2001); Guy Davidov, *Non-waivability in Labour Law*, 40 OXF. J. LEG. STUD. 482, 497 (2020).

⁶⁶ *Tillman v Egon Zehnder Ltd.* [2019] UKSC 32, [2020] AC 154 (appeal taken from EWCA (Civ)). For commentary, see Ryan, *supra* note 43, and David Cabrelli, *The Evolving Restraint of Trade Doctrine: Tillman v Egon Zehnder Ltd.*, UK LABOUR LAW BLOG (Sept. 2 2019), <https://uklabourlawblog.com/2019/09/02/the-evolving-restraint-of-trade-doctrine-tillman-v-egon-zehnder-ltd-david-cabrelli/>.

adding to or modifying the wording of the text that remains. In this way, whilst the courts can strike out offending words, they are precluded from interpolating words into the contract, since this would amount to an illegitimate and unwarranted form of rewriting the parties' contract. Secondly, the remainder of the non-compete clause must be capable of being supported by adequate consideration. Finally, if the court decides to modify the clause, there must be no significant change in the overall effect of all the post-employment restraints in the contract and it is over to the employer to establish that its removal would not do so.

This English law approach towards the severance of provisions of non-compete clauses is especially troubling insofar as it would appear to give a licence to employers to '... fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable... [which] smacks of having one's employee's cake, and eating it too'.⁶⁷ To that extent, the decision of the UK Supreme Court was symbolic inasmuch as it threw into sharp relief the lengths that the courts will go to preserve non-compete covenants imposed on employees in their contracts of employment.⁶⁸ However, this approach and decision is surprising for a number of reasons, not least of which is the sentiment of scepticism towards non-compete restrictions felt by the present British Government. This causes us to pose a salient question, which is what it is that lies behind the nervous attitude of policy-makers in the UK Government towards non-compete restrictions?

⁶⁷ Blake, *supra* note 6, at 683.

⁶⁸ Having said that, Lord Wilson in *Tillman* did strike a note that caution must be exercised in deploying severance too readily in the case of a rank-and-file, rather than a high earning or senior, employee: *Tillman v Egon Zehnder Ltd.* [2019] UKSC 32, [2020] AC 154, 181E-G (appeal taken from EWCA (Civ)).

4. From (Employee) Liberty to Policy?

The preceding discussion reinforces the notion that competing positive freedoms of the employee and the private interests of employers will not infrequently trump concerns for the employee's liberties to trade and of labour mobility. Likewise, the exposition of the current operative legal rules in English law illustrates how the 'reasonableness' and 'legitimate interests' tests exert a very deep hold on the restraint of trade doctrine. And having been cemented into place as a central part of the firmament of English employment and contract law as long ago as 1711,⁶⁹ one might be forgiven for believing that these two lynchpins of the doctrine would be perfectly entitled to inhale deeply of their own success. But any hubris concerning the assuredness of their position in the common law would be misplaced, since a lively sense of the contingency of their foundations as well as their adverse effects ought to conduce towards a certain level of humility. There are at least two reasons for this proposition. First, prior to the decision of the Chancery Court in *Mitchel v Reynolds* in 1711, the common law could justifiably lay claim to a much greater level of conceptual coherence and clarity in clinging doggedly to an uncompromising position in favour of open labour markets. In *Dyer's Case* decided in 1414,⁷⁰ the English courts ruled that an express contractual term that prohibited a former servant from plying his trade for a period of six months in the same town as his master was void. The rationale for this decision was that free competition should at all times be

⁶⁹ *Mitchel v Reynolds* (1711) 1 P Wms 181 (Eng.). And reaffirmed by the highest courts in 1894, 1916 and 2019: *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1984] AC 535 (UKHL) (appeal taken from EWCA (Civ)), *Herbert Morris Ltd. Saxelby* [1916] 1 AC 688 (UKHL) and *Tillman v Egon Zehnder Ltd.* [2019] UKSC 32, [2020] AC 154 (appeal taken from EWCA (Civ)).

⁷⁰ (1414) 2 Hen. 5, f 5, pl 26 (Eng.). For discussion, see 3 Sir WILLIAM SEARLE HOLDSWORTH, *HISTORY OF ENGLISH LAW* 56-57 (1942).

prioritised over an employer's property interests or employee loyalty to the employer. Seen from this perspective, there was no such 'reasonableness' or 'legitimate interests' criteria then, which was a situation that lasted for almost 300 years until 1711 when they were appended to the restraint of trade doctrine in *Mitchel v Reynolds*.

Secondly, heightened concerns about the uneven distributional impacts of covenants and their economic effects has risen amongst contemporary policy-makers. The suggestion is that the common law 'reasonableness' and 'legitimate interests' factors may be more amenable to removal or modification (at the very least) via legislation than traditionally thought, particularly insofar as they are felt to be responsible for impeding employees' access to new positions which would spur a rise in productivity levels and a resultant upswing in welfare in the economy. For example, the UK Government has recently issued a consultation paper seeking evidence from consultees on the impact of post-termination restrictive covenants on economic growth, competition and innovation.⁷¹ In that paper, the UK Government gave voice to the anxiety that by enabling post-termination restrictive covenants in employment contracts to be enforced, the common law has a chilling effect on entrepreneurship by hindering labour mobility, preventing workers from starting up their own business after leaving a job, and turning their ideas into a start-up. Indeed, the policy proposals for the reform of the law governing post-termination restrictive covenants can be viewed as a thinly veiled criticism of

⁷¹ See DBEIS, *Non-Compete Covenants*, in MEASURES TO REFORM POST-TERMINATION NON-COMPETE CLAUSES IN CONTRACTS OF EMPLOYMENT (Dec. 4 2020)

<https://www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment>. For commentary, see FT, *UK Aims to Nurture Start-ups by Curbing Non-compete*

Clauses, FINANCIAL TIMES (Dec.1 2020) [https://www.ft.com/content/61e5269b-07d1-49d3-afa4-](https://www.ft.com/content/61e5269b-07d1-49d3-afa4-8bafaebead41)

[8bafaebead41](https://www.ft.com/content/61e5269b-07d1-49d3-afa4-8bafaebead41). The UK Government had previously launched a call for evidence in 2016: see *Non-compete clauses—Call for Evidence*, GOV.UK (Jun. 2016) <https://www.gov.uk/government/consultations/non-compete-clauses-call-for-evidence> (last visited 14 January 2021).

the effectiveness of the “reasonableness” and “legitimate interests” strands in the common law restraint of trade doctrine. The proposed legislative reforms hunt in packs of two: first, that immediately before the employment relationship begins, the employer will be expected to provide written notice to the employee about the existence of the covenant, together with an explanation of its exact terms, and that employers should continue to pay the former employees their salary or compensation in lieu for the duration of the temporal restriction in the covenant if they invoke its terms;⁷² and secondly, that non-compete restrictions simply be banned.⁷³ It has been argued that by banning non-compete restrictions, ‘a boost would be given to labour mobility and the overall health of the economy would benefit from new industries and fresh ideas emerging’.⁷⁴ However, the greater significance in this point is how it lays bare the much broader disjuncture between the grounds for the common law doctrine and the UK Government’s arguments for the abolition of non-compete covenants. That is to say that the theoretical concerns for the negative liberty and autonomy of the employee dissected in section 2 play second fiddle to policy considerations preferring that the public interest be prioritised, as well as societal welfare and the greater good.

For this reason, the UK Government’s recent consultation paper raises a much more profound question. And that is whether the broader interests of those potentially injured by the prioritisation of the employer’s legitimate interests over the employee’s freedom to compete

⁷² On the relationship between any assessment of the consideration paid for a restriction and the substantive fairness of the covenant, see Stephen A. Smith, *Future Freedom and Freedom of Contract*, 59 MOD. L. REV. 167, 172 (1995).

⁷³ DBEIS, *supra* note 71, at 12. Of course, this second suggestion that the doctrine be abolished would take the law back to the unvarnished (and avowedly uncompromising) test inaugurated in *Dyer’s Case*, which lasted for approximately three hundred years until the decision in *Mitchel v Reynolds* (1711) 1 P Wms 181 (Eng.).

⁷⁴ See also Carrigan & Radan, *supra* note 3, at 125.

and trade – for example, the public, consumers of an employer’s goods and services, wider society and the economy – should be afforded much greater purchase than the restraint of trade doctrine has hitherto afforded them. That would be ironic for two reasons. First, when seen within the context of the UK Supreme Court’s recent approach to the treatment of severance in *Tillman v Egon Zehnder*: in that decision, by taking it upon themselves to excise certain words from the covenant where its terms were felt to be overly broad, the courts effectively provided employers with a second bite of the cherry to ensure its validity and enforceability.⁷⁵ And secondly, in light of experience regarding the common law’s approach towards Lord MacNaghten’s ‘reasonable in reference to the interests of the public... [and] in no way injurious to the public’ limb of the ‘reasonableness’ test in *Nordenfelt*.⁷⁶ To put this matter more bluntly, although it is in the common law’s invocation of this ‘public’ element that the notion of collective and societal goals is prayed in aid against the enforcement of non-compete covenants, in reality, this factor has been largely overlooked by the courts in exercising the proportionality review.⁷⁷ Instead, the foremost attention is given instead to the bipolar private interests and freedoms of the parties to the employment contract in judging the reasonableness of a covenant. The effect is to conflate the bipolar private interests and public interest parts of the ‘reasonableness’ test into one single step, which Sir Patrick Atiyah memorably referred to as the adoption “... in a somewhat new form, [of] the old economic theory of the harmony of

⁷⁵ Having said that, in another recent decision examining the applicability of the restraint of trade doctrine in the context of land, the UK Supreme Court shifted towards a ‘trading society’ test, which itself signals a turn towards greater recognition of the public interest in preference to those of the individual covenantor and covenantees: *Peninsula Securities Ltd. v Dunnes Stores (Bangor) Ltd.* [2020] UKSC 36, [2020] 3 WLR 521.

⁷⁶ *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1984] AC 535 (UKHL) 565 (appeal taken from EWCA (Civ)).

⁷⁷ For a discussion and analysis, see TREBILCOCK, *supra* note 7, at 106-109.

interests”.⁷⁸ As such, in those cases where the public interest limb has been considered, it has been said to add little to the ‘legitimate interest’ and ‘reasonableness’ assessment.⁷⁹ A number of commentators have suggested the approach of the common law is coherent on the ground that “if it is reasonable in [the]... interest [of the employer and the employee restrained], then there is no undue interference with individual liberty and the public interest test is satisfied [and]... if it is not reasonable it must be because the liberty of one of the parties is unduly restricted and the agreement is ipso facto contrary to the public interest”.⁸⁰ Likewise, it has been claimed that ‘... the [public interest in terms of the] social cost of preventing an employee from going to a job at which he would be more productive is theoretically equal, given an efficient market, with the economic loss to the individual.’⁸¹ In fact, where a non-competition clause has been held to be reasonable as regards the interests of the private parties, Lord Parker in *Commonwealth of Australia v Adelaide Steamship Co. Ltd.* went as far as to claim that a heavy burden was imposed on any party attempting to prove that it was contrary to the public interest.⁸² Seen in light of the evidence emerging from the English courts, the notion that the common law is acting as a barrier to the ‘unleash[ing of technological] innovation, [the creation

⁷⁸ PATRICK ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 699ff (1979).

⁷⁹ *Quilter Private Client Advisers Ltd. v Falconer* [2020] EWHC 3294 (QB) [179] (Calver J).

⁸⁰ CHITTY, *CONTRACTS* §16-127 (33rd ed. 2020).

⁸¹ Blake, *supra* note 6, at 687. A similar argument has been put forward by Smith, *Reconstructing Restraint of Trade*, *supra* note 31, at 594-595 and Smith, *Future Freedom and Freedom of Contract*, *supra* note 72, at 170 to the effect that the “‘public interest’ test is indistinguishable in substance from the parties’ interests test—because the parties’ interest test measures objective need rather than subjective benefit..”.

⁸² *Commonwealth of Australia v Adelaide Steamship Co. Ltd.* [1913] AC 781 (PC) 795 (Austl.). To that extent, ‘... by equating the public interests with reasonableness between the parties to the contract, [the judiciary] avoided deciding questions about the public interests in competition’: Robert B. Stevens, *Experience and Experiment in the Legal Control of Competition in the United Kingdom*, 70 YALE L.J. 867, 872 (1961).

of] the conditions for new jobs and increasing[ing] competition’⁸³ by disregarding the public interest and wider economic considerations in enabling non-compete covenants to be enforced, may indeed be a plausible claim.

This approach and mindset of the English courts fails to take seriously the proposition that there may conceivably be circumstances where an appreciable gap or difference opens up between the bipolar private interests of the parties and the public interest when a non-compete covenant is enforced. This can be articulated in terms of a disjuncture between the private costs imposed on the employee (in being restrained) and the resulting associated social costs incurred by the public. For example, the ‘... [public interest and] social cost might be different from private cost... when the restraint is being used [to enable the employer]... to monopolize the business in a specific community’.⁸⁴ This raises the tantalising possibility that a *particular environment or set of conditions* – such as monopoly – may justify greater recourse to the public interest criteria in ascertaining whether a covenant is reasonable: more later on this fundamental point below.

Any proposal to assign greater significance to the broader public interest in determining the validity of restrictive covenants would essentially herald a major step-change in approach insofar as it would evince a clear policy intention to task the judiciary with a more ‘active role in shaping the competitive nature of the economy’.⁸⁵ And if we drill down to the granular level to identify the various potential policy factors in favour of the proposition that greater consideration should be afforded to the public interest, collective societal and economic concerns, what might they be? Here, a pack of policy rationales for a departure from the common law orthodoxy jostle for our attention. The first speaks to the aforementioned anxieties

⁸³ DBEIS, *supra* note 71, at 3.

⁸⁴ Blake, *supra* note 6, at 687.

⁸⁵ Stevens, *supra* note 82, at 872.

about the barriers that non-compete restrictions impose on economic growth and efficiency. It has been claimed that the endemic use of restrictive covenants in hiring staff at a macro level, ‘... slow[s]... down the dissemination of ideas, processes, and methods... and, from the social point of view, clog[s] the market's channelling of manpower to employments in which its productivity is greatest.’⁸⁶ The first justification feeds into the second, which is the so-called “California Effect”. It is often claimed that by banning non-compete covenants in employment contracts in order to promote entrepreneurship, new talent and ideas, start-up companies and innovation, the US state of California’s legislature made a major contribution towards the emergence of ‘Silicon Valley’ and the enhanced levels of technological innovation, advancement and economic success it has experienced over the past forty to fifty years.⁸⁷ However, it would be more accurate to say that the Californian State courts will not enforce post-termination non-compete restrictions to enable employers to prevent their former employees from working for competing companies or businesses that operate in the same market.⁸⁸ In particular, it is contended that the ban on non-compete limitations ensures the ease of staff mobility, which contributes towards the free flow of information and expertise across firms whose operations are clustered within a small area of California. A ban may also incentivise employers to treat their staff well, discourage them from leaving, and raise the bar in benefits and pay packages more generally. In essence, the primary arguments for the

⁸⁶ Blake, *supra* note 6, at 627.

⁸⁷ One of the most prominent scholarly contributions is Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U.L. REV. 575, 577 (1999).

⁸⁸ See *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 950 (2008) and CAL. BUS. & PROF. CODE § 16600 (West 2011).

proscription of non-compete covenants that are derived from the “California Effect” are rooted in a commercial rationale.

It is when we come to the third policy factor that the nature of the bipolar private assessment that is involved in the application of the ‘reasonableness’ and ‘legitimate interests’ factors and the proportionality review, assumes importance. This is the realisation that by balancing the harm to the liberties of the employee against the employer’s need to impose the particular covenant to maintain its trade secrets and customer base, the formulation tends to disregard the social cost to the public and the economy that would arise if it is enforced. The end result is nothing more than a common law mechanism that seeks to prevent distributive justice by pursuing an abstentionist policy towards judicial intervention.⁸⁹ This is so, since the existence, but emasculation, of the public interest element of the common law formula arguably frustrates redistributive measures and instead limits itself to securing corrective justice between the employer and the employee who are the parties to the non-compete covenant. However, let’s assume that the public interest thread of the reasonableness test could plausibly be recast to empower the courts to focus more on the economic power that the enforcement of the non-compete covenant would provide to the employer. In such an incarnation of the doctrine of restraint of trade, where the court concludes that the resulting market power will likely give

⁸⁹ Distributive justice is a concept that refers to redistribution of resources away from one party to a relationship to another party to the same relationship based on internal considerations relevant to one of those parties or external criteria such as efficiency or need, etc: see WILLIAM LUCY, *THE PHILOSOPHY OF PRIVATE LAW* 327ff (2006). Meanwhile, corrective justice is a form of justice that that imposes (a correlative form of) liability on a party to a relationship as a result of a set of reasons or justifications relevant and/or applicable to that relationship itself, rather than any factors related to one of the parties in particular, such as his/her skills, resources, intelligence, which have no bearing on determining whether he/she is liable in law: ERNEST WEINRIB, *CORRECTIVE JUSTICE* 3-5, 16-19 & 36 (2016).

rise to social costs greater than the private loss incurred by the restrained employee, it would be prioritising the redistribution of resources over the correction of private wrongs.

However, a final, and it is argued, much more material, rationale that can be extrapolated from the immediately preceding third policy consideration, but has been overlooked to date, is the contribution that post-termination non-compete restrictions make to the ability of employers to harness their monopsonistic or oligopsonistic labour market power in order to crowd out competitors and suppress wage levels and outputs.⁹⁰ Scholarship accumulated over the past two decades provides support for the proposition that labour markets are more concentrated than was once previously understood.⁹¹ This gives rise to monopsonistic and oligopsonistic conditions in the labour market where demand is limited to a single acquirer (or handful of acquirers) of labour and the available supply invariably consists of an abundance of labour.⁹² Such monopsony or oligopsony arises as a result of a combination of factors, such as ‘concentration [in the labour market,]... search frictions, and job differentiation.’⁹³ Concentrated industries are less competitive with fewer employers offering particular kinds of work, either in general terms, or in a particular geographical community. As such, workers are

⁹⁰ See Ioana Marinescu & Eric A Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1346 (2020); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV L. REV 536 (2018) and Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2019).

⁹¹ See Jose Azar et al., *Labour Market Concentration*, NBER Working Paper No. 24147 (2017) <https://www.nber.org/papers/w24147>; Jose Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON. 101886 (2020); OECD, *Competition in Labour Markets*, OECD.org (Feb.26 2020), <http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

⁹² For the theory behind this claim and the evidence in its favour, see Marinescu & Hovenkamp, *supra* note 90, at 1040-1048 and Naidu et al., *supra* note 90, at 560-569.

⁹³ See Marinescu & Posner, *supra* note 90, at 1349.

subject to economic forces that naturally dissuade them from quitting their jobs, which incentivises employers to act opportunistically, pay below-competitive wages and take liberties with their staff and their working conditions. Job differentiation arises because different employers offer differing benefits to employees and employees, who then drift towards those remuneration packages that align with their preferences. As a result, employees become locked into particular packages, which are not always readily portable to new employers, meaning that any threats to move jobs fail to convince, again incentivising employers to take advantage of this inbuilt reluctance by suppressing wages and diluting working conditions.⁹⁴ Monopsonistic and oligopsonistic market conditions also serve to create frictions to new hirings, negatively impacting on the labour market as workers subject to such an environment experience greater difficulties in finding new jobs. Employers know this and for that reason are less fearful of losing key staff (who have invested specific human capital in the firm) to competing firms and/or nervous about paying wages at levels below the equilibrium rate equivalent to their marginal product in the labour market.⁹⁵ And the most crucial point of this discussion is how post-employment non-compete covenants amplify the problem of search and mobility frictions by enabling employers to “consolidate [and] expand [their] labour market power”.⁹⁶ They do so to the extent that by “... promising not to engage in [competing activities] for five years after leaving the employment of firm A, the employee has effectively agreed to [continue to] work for firm A or to cease [such activities] for five years”.⁹⁷ Furthermore, any commercial losses generated in reduced productivity attributable to such behaviours that are associated with monopsonistic employers are dwarfed by the savings in labour costs flowing from suppressed

⁹⁴ See id. 1350.

⁹⁵ See id. 1349.

⁹⁶ Naidu et al., *supra* note 90, at 560-596.

⁹⁷ Rubin & Shedd, *supra* note 24, at 95.

wages.⁹⁸ This point is significant, since wage stagnation lies at the heart of the rapid decline in the labour share of GDP.⁹⁹ For example, Barkai has articulated the claim that “... the decline in the labor share is due to a decline in competition... accompanied by large gaps in output, wages, and investment...” He goes on to recommend: “... that without a subsequent increase in competition, the labor share will not revert to its previous level.”¹⁰⁰

In the final analysis, what this research about concentrated labour markets and the endemic nature of monopsony and oligopsony suggests is that there is indeed a case for the reform of the restraint of trade doctrine to drive down the order of magnitude of the aforementioned search and mobility frictions.¹⁰¹ It speaks to a policy rationale for legal intervention that would set aside a non-compete covenant where the prevalent market

⁹⁸ See Marinescu & Posner, *supra* note 90, at 1351 and Carrigan & Radan, *supra* note 3, at 129.

⁹⁹ See Marinescu & Hovenkamp, *supra* note 90, at 1032; the joint publication by the ILO & OECD, LABOUR SHARE IN G20 ECONOMIES 9-10 (2015), <https://www.oecd.org/g20/topics/employment-and-social-policy/The-Labour-Share-in-G20-Economies.pdf>; THOMAS PICKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 215-234 (2014); Loukas Karabarbounis & Brent Neiman, *The Global Decline of the Labor Share*, 129 Q.J. ECON. 61 (2014); Simon Deakin et al., *How Do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD Countries, 1970–2010*, 153 INT’L LAB. REV. 1 (2014); Engelbert Stockhammer, *Determinants of the Wage Share: A Panel Analysis of Advanced and Developing Economies*, 55 BRIT. J. INDUS REL. 3 (2017); BRANKO MILANOVIC, CAPITALISM, ALONE 22-27 (2019).

¹⁰⁰ Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421, 2457 (2020).

¹⁰¹ By doing so, wage levels will rise, albeit modestly, which is in the public interest, particularly in the context of the post-Covid economic recovery, where the revival will be stimulated in the UK by a consumer demand-led growth model, e.g. see Lucio Baccaro & Jonas Pontusson, *Rethinking comparative political economy: the growth model perspective*, 44(2) POL. & SOC’Y 175 (2016) and Scott Lavery, *The Legitimation of Post-crisis Capitalism in the United Kingdom: Real Wage Decline, Finance-led Growth and the State*, 23 NEW POLITICAL ECON 27 (2018).

conditions and environment dictate that if it were enforced, the economic and social cost imposed on society would be higher than the individual economic loss and harm sustained by the employee restrained in terms of the denial of his/her liberties. Research indicates that such conditions may well arise in non-competitive labour markets for the reason that the search and mobility frictions not only cause harms to the employees, but also the public. That is the case because the restrictive covenant acts as a natural deterrent to new firms who would otherwise have entered into the market to compete with the employer by offering higher wages and better conditions to employees and by lowering the prices for goods and services charged to consumers: if they cannot access any staff, they will set up their business elsewhere.¹⁰² Economic research into monopsony indicates that although monopsonistic employers extract suppressed input prices from their suppliers (including labour) and as such, enjoy lower input costs, this does *not* translate into lower output prices charged to the consumers of their products or services. In fact, the common effect is for output prices to *rise*. In this way, by deterring new firms from entering the marketplace, measures such as restrictive covenants that serve to heighten search and mobility frictions, ought to be tackled, less overall welfare in the economy be allowed to deteriorate. In essence, there is a category error inherent within the restraint of trade doctrine inasmuch as it equates the social cost to the public of enforcing a covenant with the private cost and loss sustained by the employee restrained. Instead, where there is monopsony, the endemic use of restrictive covenants by an employer will result in a disjuncture between this social and private cost. As such, there are clearly social and economic costs imposed by the failure of the ‘reasonableness’ criterion in the restraint of trade doctrine to consider the broader distributional impacts in upholding a covenant where it is ruled not to have infringed on the liberty of an employee to trade.

¹⁰² For a discussion, see ROGER BLAIR & JEFFREY HARRISON, MONOPSONY IN LAW AND ECONOMICS 43-48 and 53-67 (2010).

If we turn to consider the potential shape of those reforms, here we can evoke two specific frameworks, the first of which entails a more intensive level of intervention, and the second a less heightened one. And both of these can be referred to as the “thick” and “thin” incarnations of reform. The first “thick” variety is the most extreme option, entailing an outright ban on non-compete covenants on the ground that they give rise to policy concerns oriented around monopsony and oligopsony in labour markets and counter the possibility of a California effect. And as noted above, this is one of the UK Government’s options for reform of the common law restraint of trade doctrine. However, it is the second “thin” model that is the least intrusive. It provides that in determining the validity of a covenant, its broader distributional impacts ought to be given greater prominence and at least as much as the private loss or harm to the employee. This would entail a heightened degree of value attributed to the interests of the public, wider society and the economy, which would operate in tandem with the traditional concerns for the employee’s liberties to compete, trade and mobility to press down on the covenant. In essence, it would involve proper application of the public interest strand of the ‘reasonableness’ criterion in the restraint of trade doctrine.

The author harbours a strong preference for the “thin” over the “thick” model of reform. And the justifications for this position are rooted in a mixture of policy and practicalities. First, the “thin” variable represents a much less extreme package of reforms, as a comprehensive ban would arguably cause disproportionate harm, by imposing all sorts of illegitimate adverse economic impacts on the property rights of employers who are operating in competitive labour markets. Secondly, whilst conceivably it would be consistent with concerns about monopsony power, an outright ban on restrictive covenants would provoke a great deal of resistance for more practical reasons. Such clauses simply would be replaced by garden leave clauses.¹⁰³ For

¹⁰³ A “garden leave” clause is a provision in an employment contract that instructs an employee to stay at home and not perform work in return for wages which operates in “circumstances where either the employer or (more

that reason, the approach of conferring more prominence to the public interest test is sound as a policy consideration and a more pragmatic compromise.

There are a range of objections to the proposed “thin” reform which prefers the enhancement of the role for the public interest thread of the ‘reasonableness’ test in addressing the enforceability of restrictive covenants. The first resides in the purpose of contract law as a field of enquiry. It is traditionally treated as an area predicated on the expression of freedom *to and of* contract on the part of individuals. In general, it shuns public policy measures of a mandatory nature or consideration of the public interest in interpreting and applying the terms of the parties’ agreement. However, this line of argument fails to account for the fact that the restraint of trade doctrine is itself rooted in public policy, which is a specific area of contract law that avowedly prefers mandatory rules over private ordering. It also overlooks the reality that the law governing the employment contract is inherently couched in terms of policy considerations. As noted by Lord Sumption in *Société Générale (London Branch) v Geys*:¹⁰⁴

often) the employee gives notice but the employer does not want the employee to attend work during the notice period... [and] does not want the employee to work for a competitor during that period...”: *Christie v Johnston Carmichael* [2010] IRLR 1016 (EAT) [38] (Lady Smith) (Scot.). In form, garden leave clauses differ from non-compete covenants, but their consequences for the employee, in substance, are more or less identical.

¹⁰⁴ [2012] UKSC 63, [2013] 1 AC 523, 567 (Lord Sumption) (appeal taken from EWCA (Civ)). See also another Justice of the UK Supreme Court, Lord Kerr, in his judgment in a case called *Gisda Cyf v Barratt* [2010] UKSC 41, [2010] 4 All ER 851 [37]-[39] (appeal taken from EWCA (Civ)). For a penetrating analysis of the public and private dimensions of labour law rules, see CYNTHIA ESTLUND, *The Fall and Rise of the Private Law of Work*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 412 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) and ADITI BAGCHI, *The Employment Relationship as an Object of Employment Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 361 (Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly & Henry E. Smith eds., 2021).

‘... contracts of employment are governed by the same principles as other contracts, except in those cases where their subject matter gives rise to compelling policy considerations calling for a different approach... the relationship of employer and employee is especially liable to give rise to policy considerations of this kind, because its incidents have significant social and economic implications.’

A second objection to the proposed re-calibration of the law (that would place greater pressure on the public interest in the reasonableness test and consideration of the employer’s market power) is that an area of labour law – the restraint of trade doctrine – would be treading on territory traditionally regulated by anti-trust/competition law. Indeed, it might be claimed with some credibility that not only would there be unnecessary duplication, but also that anti-trust/competition law is much better placed to undertake such assessments of economic power dynamics. In colloquial terms, labour law should simply back off. However, neither is this argument particularly persuasive. First, the existence of concurrent liability in contract law and anti-trust/competition law would be nothing unusual. For example, the performance of the contract of employment is governed by the law of contract, the law of tort and also by employer duties enshrined in legislation. To that extent, an employer may contravene the law governing the employment contract where it breaches contract law, commits a tort, or breaches a statutory duty. And this is so routine that it is generally treated as unremarkable. Secondly, the proposed ‘thin’ adjustment of the doctrine of restraint of trade in this article (towards greater recognition and evaluation of market-centred dynamics in terms of the public interest limb of the ‘reasonableness’ test) is sufficiently modest that its primary objective of upholding the personal liberty of the covenantor could continue to be cited as the means by which it is to be differentiated from the economic-oriented goals of anti-trust/competition law.¹⁰⁵ For example,

¹⁰⁵ See Mary Lucey, *Safeguarding the Restraint of Trade Doctrine from EU Competition Law: Identifying the threat and Proposing Solutions*, 52 IRISH JURIST 115 (2014) and MARY LUCEY, *Restraint of Trade*

were the doctrine to be reformed in this way, both labour law and anti-trust/competition law would continue to perform completely different functions: an employee would continue to have no automatic right to table economic or market data indicating that the employer benefits from monopsony – thus justifying recourse to the public interest limb of the reasonableness test – unless the courts were first persuaded by data presented by the employee that the labour market (in which the employer operates) was concentrated and uncompetitive. In contrast, assessments of the economic power wielded by the employer in the labour market, would be possible as a matter of course under anti-trust and competition law cases. In the final analysis, it could not be presupposed that both of the legal techniques applied under labour law and anti-trust/competition law would be designed to achieve the same objectives, since a crucial role for the bipolar private interests and freedoms of the parties would be retained and secured in the case of the restraint of trade doctrine. In addition, an enhanced role for the doctrine in articulating when the public interest would be muzzled by a restrictive covenant should be embraced, given the inherent flexibility of the techniques involved in its application, which are perhaps lacking in anti-trust/competition law cases.

A third counterargument is animated by a concern for cost, time, resources and efficiencies in the administration of justice in the courts. The anxiety is that adding teeth to the public interest thread of the ‘reasonableness’ test of the restraint of trade doctrine would increase uncertainty for businesses, since it would introduce higher levels of legal complexity into the equation. The consequence is unpredictability in terms of the effects on the scarce resources of the court system, which is often referred to as the risk that the “floodgates” are opened to litigation, i.e. “the fear of an unreasonable imposition of liability on too great a scale

Doctrine: A Traditional Tool Fit for the Modern Economy?, in ESSAYS IN MEMORY OF PROFESSOR JILL POOLE: COHERENCE, MODERNISATION AND INTEGRATION IN CONTRACT, COMMERCIAL AND CORPORATE LAWS 164 (Rob Merkin & James Devenney eds., 2018).

to be tolerable”.¹⁰⁶ However, concrete empirical evidence has never been presented to substantiate this anxiety.¹⁰⁷ Nor is there any reason of principle why the modification of a legal rule should be rejected to deny a remedy simply because it would be beneficial to the many instead of the few.¹⁰⁸ For these reasons, it has been claimed by the judiciary that the floodgates argument is “greatly exaggerated”.¹⁰⁹ This leads to the conclusion that there is scant justification to be fearful about the proposed reform since it represents a modest adjustment of an existing rule, amounting to nothing more than a “controlled opening of the gates, permitting the flooding of a [carefully prescribed] area, rather than a wholesale inundation of unforeseeable and uncontrolled proportions”.¹¹⁰

Finally, it is often argued that because judges are not economists, the law should not be shaped in a direction that compels them to assess levels of market power.¹¹¹ Whilst that might be so, the law does expect the judiciary to adjudicate disputes of a profoundly economic bent in the case of anti-trust/competition law. For example, consider the decisions of the UK Supreme Court in *Mastercard Inc v Merricks* CBE and of the High Court in England in *Britned Development Ltd. v ABB AB*.¹¹² In both cases, the judiciary engaged in extensive and complex

¹⁰⁶ *Leigh & Sullivan Ltd. v the Aliakmon Ltd.* [1985] 1 QB 350, 393 (Lord Justice Goff).

¹⁰⁷ See MAURO BUSSANI & VERNON PALMER, *The Notion of Pure Economic Loss and Its Setting*, in PURE ECONOMIC LOSS IN EUROPE 18 (Mauro Bussani & Vernon Palmer eds., 2003).

¹⁰⁸ *Junior Books Ltd. v Veitchi Co. Ltd.* [1983] 1 AC 520, 539 (Lord Roskill).

¹⁰⁹ See *McLoughlin v O'Brian* [1983] 1 AC 410, 442 (Lord Bridge).

¹¹⁰ *Leigh & Sullivan Ltd. v the Aliakmon Ltd.* [1985] 1 QB 350, 393 (Lord Justice Goff).

¹¹¹ For a critique of the ability of the judiciary and the law to make economic judgments, as well as the general failure of judges to make economic calculations in their reasoning, see ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 14-18 (1995), STEPHEN SMITH, *CONTRACT THEORY* 132-136 (2007) and JONATHAN MORGAN, *CONTRACT LAW MINIMALISM* 43-60 (2013).

¹¹² [2020] UKSC 51, [2021] Bus. L.R. 25 and [2018] EWHC 2616 (Ch), [2019] Bus. L.R. 718.

economic calculations and analysis. To that extent, senior judges are already familiar with the techniques that are necessary to calculate economic power in particular markets and sectors of the economy, and how an employer's situation fits within that environment. As such, the claim that the law should not expect judges to act as economists in dispute resolution is as much unconvincing as it is unconvincing.

5. Conclusion

This article promotes the reform of the common law restraint of trade doctrine in English Law so that its abiding concern for the individual liberties of employees who are subjected to post-termination covenants are relegated to a marginal degree, with a corresponding heightening in the recognition it affords to public concerns. Although such a package of reform is ironic and perhaps a reversal of Victorian priorities on the protection of liberties, it resonates with Governmental anxieties about the wider economic effects of the common law that are gaining currency in policy circles, as well as their diagnosis of the problems that it can generate. Although a welcome addition to the debate surrounding the common law, the UK Government's prescriptions for reform are perhaps slightly wide of the mark when considered in light of its useful diagnosis. The question is how the challenge posed to society, the public and the economy by the common law and its myopic attitude towards the existence of search frictions in monopsonistic and concentrated labour markets that are caused by restrictive covenants can best be addressed. The solution presented by this article is for the common law tests to be specifically adapted by the judiciary or legislation to enable the courts to look beyond the private costs imposed by the covenants on the employee, so that more market-oriented factors are accounted for. And the claim is made that the failure of the common law restraint of trade doctrine to account for an employer's labour market power in weighing up the case for

and against the validity of a non-compete covenant is no longer tenable in light of recent research findings on the ubiquity and nature of employer monopsony.